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## RIGHT OF STATES TO DECLARE NON-NAVIGABLE RIVERS NAVIGABLE.

The Desplaines River in Illinois, although unnavigable, was declared navigable by the State Legislature. In the recent case of *People v. Economy Light and Power Co.*, reported in the 89 N. E. Rep. 760, a bill in equity to restrain the defendant from erecting a dam across the river and to cause the removal of that part of the dam already erected, was dismissed. The decision was based upon the ground that to grant the injunction would be to deprive the defendant of vested property rights which existed in him with reference to the river in its original state.

The court first found that the title to the bed of the stream was in the defendant, who was a riparian proprietor. Under a well-established rule of law such a proprietor, in the absence of language limiting his ownership to the edge of the stream, owns to the thread thereof. *Braxton v. Bressler*, 64 Ill. 488; *Angell, Water Courses*, Sect. 5; *Coover v. O'Conner*, 8 Watts (Pa.) 470; *Shell v. Mattison*, 81 Minn. 38.

The uninterrupted use of one's property is a right guaranteed to every citizen of the United States by its Constitution, and a similar provision may also be found in practically all of the State constitutions. A man's property is his absolutely to use as he sees fit, so long as he does not violate the rights of another. There are times when the right of an individual must be subservient to the public good; and for this purpose the power of eminent domain may be invoked. " \* \* \* Yet the right of eminent domain does not authorize the government, even for a full compensation, to take the property of one citizen and transfer it to another, when the public is not interested in the transfer." *Angell, Water Courses*, Sect. 467 (7th Ed.).

If the riparian proprietors, then, own to the thread of the stream, is not a legislative enactment declaring a non-navigable stream navigable, without making provision for the compensation of the owners who are to be thus deprived of their vested rights, unconstitutional?

The good to be derived by the public in the matter of declaring certain streams navigable is sometimes greater than the rights of the individual. In *Morgan v. King*, 35 N. Y. 454, which seems to be the most cited case on this subject, the court said:

"If prior to the passage of the act, the stream was private, in use as in property, the legislature could not take away the rights of those who were then riparian owners, nor subject such rights to a public use, created or authorized by the act itself, without compensation. A statute declaring a private stream, on which riparian owners have vested interests, a public highway, without providing compensation to the owners is null and void." *Glover v. Powell*, 10 N. J. E. 211; *Murray v. Preston*, 106 Ky. 561; *Thunder Bay River Booming Co. v. Speechly*, 31 Mich. 336; *Farnum, Waters and Water Rights*, Vol. I, p. 119; *State v. Pool*, 74 N. C. 402; *People v. Elk River, (etc.) Co.*, 107 Cal. 221; *Spring v. Russell*, 7 Greenl. (Me.) 273.

All navigable streams are for the public use and are considered public highways. There can, of course, be no exclusive appropriation of them by an individual to his private use. *Cooley, Constitutional Limitations*, p. 590; *Thunder Bay (etc.) Co. v. Speechly, supra*. While a State Legislature may determine whether or not a stream is navigable, the navigability of a stream is to be determined with reference to its natural condition, and when it is not navigable in fact the declaration of the legislature that it shall be deemed a navigable stream will not make it so. *The Daniel Ball*, 10 Wall. 557; *U. S. v. Rio Grande Dam & Irrigation Co.*, 174 U. S. 690; *The Montello*, 20 Wall. 430; *Morgan v. King, supra*.

The test of navigability is one which causes confusion. Sir Mathew Hale, in his work on *De Jure Maris* (Hargrave's Law Tracts, pp. 8 and 9), says: "There be some streams or rivers that are private, not only in propriety and ownership, but also in use, as little streams or rivers that are not a common passage for the King's people." And in *Rowe v. Granite Bridge Co.*, 21 Pick. (Mass.) 344: It is not "every small creek in which a fishing skiff or gunning canoe can be made to float at high water that is deemed navigable; but, in order to give it the character of a navigable stream it must be generally and commonly useful to some purpose of trade or agriculture." The real test seems to be that streams must be capable, in their natural condition, of being used as commercial highways over which ordinary river trade or travel may be conducted. *The Daniel Ball, supra*; *Cooley's Consti. Lim.* 590; *Harrison v. Hite*, 148 Fed. 481; *Olive v. State*, 86 Ala. 88.

Nor will the artificial improvement of a river making it navigable enable the legislature to divest riparian owners of their rights. *Canal Comrs. v. People*, 5 Wend. (N. Y.) 423; *Webster v. Harris*, 11 Tenn. 668; *Cooley's Consti. Lim.*, p. 590.

It is almost universally held that if a person improves a stream, at his own expense, so as to make it navigable, he may at any time render it again unnavigable. *De Jure Maris*, *supra*, p. 9. And the owner may open a way for his own accommodation and refuse to permit others to use it without just compensation. *Wadsworth Admr. v. Smith*, 11 Me. 278. In *Crenshaw v. Slate River Co.*, 6 Rand. (Va.) 254, the court held that after a mill was established and a dam erected and the use of the water granted to the miller, the legislature could not subsequently compel him to build locks through his dam without a full indemnification for the injury done to his vested rights. *State v. Glen*, 53 N. C. 321; *Glover v. Powell*, 10 N. J. E. 211.

In view of the constitutional provision against the taking of private property for public use except by the exercise of the power of eminent domain, it is clear that a state can no more make an unnavigable river a public highway than it can build a public road over one's farm without paying for the right of way.

The rule undoubtedly is that a state can not in any way make an unnavigable stream navigable and thereby destroy or damage the private property rights of adjacent owners without making compensation. If the public good is to be subserved by forcing a public way through private possessions, the only condition on which it can be permitted in constitutional governments is that the owner be compensated for the property which he surrenders to the public.

*C. V. P., Jr.*

#### VALIDITY OF A CONTRACT BETWEEN ALL THE STOCKHOLDERS OF A CORPORATION FOR THE CONTROL OF THE BOARD OF DIRECTORS.

A very important and interesting decision in corporation law has just been handed down by the New Jersey Court of Appeals and Errors. The question involved is a novel one: Is a contract valid which is entered into by two persons, who own all of the capital stock of the corporation, providing for the control of the board of directors of the corporation? This court thinks it is